

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

<p>-----</p> <p>In the matter of:</p> <p>Complaint of Spirit Airlines, Inc.</p> <p>For the Investigation of the Joint Venture</p> <p>Agreements Announced by American</p> <p>and JetBlue Airways</p> <p>-----</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket DOT-OST-2021-0001</p>
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**SUPPLEMENTAL COMMENT OF
SERVICE EMPLOYEES INTERNATIONAL UNION**

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September 10, 2021

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**SUPPLEMENTAL COMMENT OF
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On behalf of its members, the Service Employees International Union (“SEIU”) submits this Supplemental Comment in regards to the Complaint submitted by Spirit Airlines, requesting an on-the-record investigation under 49 U.S.C. § 41712 as an unfair method of competition.

As outlined in our prior filing, SEIU is a labor organization that represents nearly 2 million workers across the United States and Canada, in the healthcare industry, state and local government, and in service industries. SEIU’s members include janitors, security officers, and airport workers, among others. Contracted aviation service workers organized through SEIU’s Airport Workers United campaign represent more than 35,000 of the union’s members. These workers, mostly women, immigrants, and people of color, provide vital services that keep the aviation system working, from cleaning cabins, to caring for elderly and disable passengers, to keeping airports safe and secure. While our members primarily work for contractors hired by the airlines, the airlines wield significant power over this highly fragmented workforce.¹

¹ Callaci, Brian, Fissuring in Flight: Consolidation and Outsourcing in the US Domestic Airline Industry, 1997-2018 at pp. 11, 46 (Jan. 7, 2020) available at <https://cwaunion.org/sites/default/files/20200108-fissuring-in-flight.pdf>.

SEIU renews its support for a public interest review.

I. The Department of Transportation is Mandated to Address the Negative Impacts of Industry Consolidation on Working Conditions of Airport Workers

As explained in the Spirit Airlines Consolidated Reply, Congress has tasked the Department and its predecessor agencies with “protection of the public interest” dating back to the Civil Aeronautics Act of 1938.² Workers within the transportation system are a key component of the public interest that the Department has been tasked with protecting. Prior to its dissolution, the Civil Aeronautics Board was instructed by statute to consider “the need to encourage fair wages and equitable working conditions” as being in the public interest.³ To this day, it is the duty of the Secretary of Transportation to “consult and cooperate with the Secretary of Labor in . . . promoting industrial harmony and stable employment conditions in all modes of transportation.”⁴

The Department is further urged to protect workers from the effects of market concentration on the welfare of workers by President Biden’s Executive Order 14036 of July 9, 2021 (Promoting Competition in the American Economy).⁵ Pursuant to this Executive Order, the Secretary of Transportation is urged to use the agency’s authority to, among other things, “combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.”⁶

² Consolidated Reply of Spirit Airlines to Responses of American Airlines and JetBlue Airways (July 2, 2021), Docket DOT-OST-2021-0001.

³ PL 95-504, “The Airline Deregulation Act of 1978”, Section 3.
<http://uscode.house.gov/statutes/pl/95/504.pdf>.

⁴ 49 U.S.C. § 301(5).

⁵ Executive Order on Promoting Competition in the American Economy, (E.O. 14036), 86 F.R. 36987 (July 9, 2021) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁶ EO 14036, Section 1, Section 5(a).

Because the review of the Northeast Alliance took place behind closed doors, workers were denied the opportunity to review crucial information about the partnership and provide the Department with input on how it could act to protect their interests. While this charge was always part of the Department's mandate, the Executive Order provides new impetus for the Department to right this wrong by opening an on-the-record investigation and taking action to address the concerns of airport workers. Accordingly, SEIU submits that the request of Spirit Airlines for a hearing and public review should be granted.

II. The Northeast Alliance Increases Market Concentration to the Detriment of Workers and Consumers and Raises the Potential for Monopsony Power in Airport Services Markets

Since the early 2000s, airlines have increasingly fragmented and destabilized the workforce that provides critical services from wheelchair services to baggage assistance to security to aircraft cleaning. Airlines frequently outsource key jobs, shift work to subsidiaries, or change contractors, which might improve their bottom line, but results in uncertainty and precarity for workers.⁷

Outsourcing is one strategy that airlines have used to cut costs and pad their bottom lines at workers' expense.⁸ From 2002 to 2019, airlines cut more than 100,000 direct jobs⁹ even while attracting more passengers than ever.¹⁰ In 1991, an estimated 16% of employment in the US

⁷ Miranda Dietz, Peter Hall, and Ken Jacobs, Course Correction: Reversing Wage Erosion to Restore Good Jobs at American Airports, UC Berkeley Labor Center. (October 2013).

⁸ *Id.*

⁹ BLS Data for Industry Total Employment in Scheduled Air Transportation (NAICS Code 481100) <https://www.bls.gov/oes/#data>; Passenger data for All Carriers and United Air Lines. Bureau of Transportation Statistics. https://www.transtats.bts.gov/Data_Elements.aspx.

¹⁰ Bureau of Transportation Statistics data, Passengers, All U.S. Carriers – All Airports, https://www.transtats.bts.gov/Data_Elements.aspx?Data=1.

passenger airline industry was outsourced.¹¹ By 2019, that number had climbed to 31.5%.¹² Multiple studies have shown a reduction in pay, benefits, and union representation tied to this wave of outsourcing. And, as a result, employee turnover in these positions can be extremely high, in some cases more than 100% annually.¹³

Airport workers have led the charge to improve their jobs – campaigning to raise minimum wages and collectively bargain to raise standards.¹⁴ Some Airlines have responded to this growth in worker power by finding new ways to undermine their workforce, changing contractors and even bringing previously contracted work back in-house to avoid complying with living wage ordinances.¹⁵ No matter who their employer is, the ability of workers to demand fair terms of employment is highly dependent on the airlines.

Because of the high levels of concentration in the airline industry, particularly at airports affected by the NEA,¹⁶ airlines can exercise significant power in the market for airport services and the contractors who provide such services.¹⁷ Although enforcement of competition laws has traditionally focused on the effect of market power among sellers (monopoly power), recent

¹¹ Miranda Dietz, Peter Hall, and Ken Jacobs, Course Correction: Reversing Wage Erosion to Restore Good Jobs at American Airports, UC Berkeley Labor Center. (October 2013) Page 5, Figure 1.

¹² BLS Data for Industry Total Employment in Scheduled Air Transportation (NAICS Code 481100) <https://www.bls.gov/oes/#data>; Passenger data for All Carriers and United Air Lines. Bureau of Transportation Statistics. https://www.transtats.bts.gov/Data_Elements.aspx.

¹³ Miranda Dietz, Peter Hall, and Ken Jacobs, Course Correction: Reversing Wage Erosion to Restore Good Jobs at American Airports. UC Berkeley Labor Center. (October 2013) p. 17. http://laborcenter.berkeley.edu/pdf/2013/restore_good_jobs_american_airports.pdf.

¹⁴ Airport Workers Protesting Around the Globe for Fair Wages, Union Rights, October 2, 2018. <https://www.globenewswire.com/en/news-release/2018/10/02/1588269/0/en/Airport-Workers-Protesting-Around-the-Globe-for-Fair-Wages-Union-Rights.html>.

¹⁵ Callaci, Brian, Fissuring in Flight, *supra* at p. 10 (e.g., American Airlines in-sourced previously outsourced wheelchair attendants at Miami International Airport in 2018, which allowed it to avoid paying Broward County's living wage).

¹⁶ Complaint of Spirit Airlines, Inc. (Jan. 7, 2021) Docket DOT-OST-2021-0001 at pp. 5-7.

¹⁷ See Callaci, Brian, Fissuring in Flight: Consolidation and Outsourcing in the US Domestic Airline Industry, 1997-2018 at p. 46 (Jan. 7, 2020) available at <https://cwa-union.org/sites/default/files/20200108-fissuring-in-flight.pdf>; see also Horizontal Merger Guidelines at § 5.3 (Aug. 19, 2010).

scholarship has emphasized the need to focus on monopsony power (concentration among buyers, particularly in labor markets) and its economically harmful effects.¹⁸ At the levels of concentration facilitated by the NEA at key airports as measured by the Herfindahl–Hirschman Index (HHI),¹⁹ firms are presumed to hold significant market power and may act as both price setting suppliers *and* price making purchasers, especially in geographically concentrated markets such as exist here.²⁰ Such levels of concentration should raise serious concern about the exercise of monopsony or oligopsony power by these airlines.

Local contractors, many of whom specialize in providing airport services and thus rely heavily on obtaining contracts for services from these airlines, may be forced to take cut-rate prices because of their relatively weak bargaining position in this monoposonized market. Across the economy, evidence shows that large buyers of services, such as airlines, have consistently been able to push down the price that they pay to dependent suppliers, such as airport service providers.²¹ In the airport industry in particular, mergers and consolidations have resulted in significant reductions in wages and benefits for workers.²² This may be even more true where

¹⁸ See Krueger, Alan and Posner, Eric, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion, The Hamilton Project (Feb. 2018) available at https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf; Vaheesan, Sandeep and Buck, Matthew, Antitrust’s Monopsony Problem (Feb. 3, 2020) available at <https://promarket.org/2020/02/03/antitrusts-monopsony-problem/>.

¹⁹ Complaint of Spirit Airlines, *supra* at p. 22, Exh. B.

²⁰ As the Horizontal Merger Guidelines make clear, market power among buyers (monopsony or oligopsony power) raises the same concerns as does power among sellers and is subject to “an analytical framework analogous to” the framework applied in the monopoly context. Monopsony power is likely to depress prices paid by buyers below competitive levels and depress output. See Horizontal Merger Guidelines, *supra* at § 0.1.

²¹ See Wilmers, Nathan, Wage Stagnation and Buyer Power: How Buyer-Supplies Relations Affect U.S. Workers’ Wages, 1978 to 2014, 83 Amer. Soc. Rev. at p. 231 (2018) available at <https://journals.sagepub.com/doi/pdf/10.1177/0003122418762441>.

²² Kim, Myongjin et al, Merger and Labor Market Outcomes in the US Airline Industry at p. 18 (Jul. 10, 2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615410.

airlines can exploit their monopsony power over contractors, free from resistance by their direct employees who are often unionized and able to push back against wage and benefits cuts.

Workers and consumers are the ultimate victims of monopsony power in contract-services markets. Contracting and subcontracting by dominant buyers has played a major role in rampant wage stagnation across various industries.²³ When an employer receives a large proportion of its revenue from just one or two large, dominant buyers, it has little choice but to succumb to cost-cutting measures pushed by these dominant players. Workers must then negotiate with their squeezed employers over a shrinking pool of money, cut off from the real profits that their work is helping to build. In effect, the airlines and other companies who employ this strategy can leverage their dominant market position to extract surplus profits from their suppliers and simultaneously starve the frontline workers who are essential to the successful operation of their businesses, all while barring these workers from negotiating a share of their increasing profits.

Not only does this market structure result in wage-stagnation, but cut-rate prices also force employers to understaff and overwork their employees, depriving customers and workers of the safety and security that the Department is entrusted to ensure. Corners may be cut because of understaffing, and low wages and unstable schedules lead to high turnover, meaning workers often lack the necessary experience and training to effectively deal with safety and security risks.²⁴ Artificially low staffing levels is a hallmark of monopsony in labor markets.²⁵ This issue

²³ Wilmers, *supra* at p. 231.

²⁴ See Airports United, Record profits for airlines: airport workers under pressure at pp. 15-16 (May 2016) available at <https://www.cadenadesuministro.es/wp-content/uploads/2016/05/Record-Profits-for-airlines-airport-workers-under-pressure.pdf>.

²⁵ Marinescu, Iona and Hovenkamp, Herbert, Anticompetitive Mergers in Labor Markets at p. 4 (Feb. 20, 2018) available at http://scholarship.law.upenn.edu/faculty_scholarship/1965.

has only been exacerbated during the pandemic.²⁶ Allowing further concentration in this market without adequate safeguards may only deepen these two problems, as airlines leverage their growing market power to further depress wages and employment levels.

In their supplemental complaint, Spirit identified ways in which the partnership of JetBlue and American Airlines through the NEA is already allowing them to engage in anticompetitive behavior.²⁷ The fact that JetBlue and American may be already using the NEA to set prices above competitive levels and plan to leverage their partnership to further consolidate their position across the country should raise enormous concerns for the Department, not only because of the detriment to consumers, but also because of the potential losses to workers in terms of wages, benefits and stable employment.

Because the Department under the previous administration did not conduct a public hearing, none of these potential losses to workers were fully considered. The Department's analysis of the NEA contains no discussion of the consequences for workers of further consolidation in this industry.²⁸ Failure to discuss these important issues is inconsistent with both the Department's statutory mandate to work to maintain stable employment conditions and with President Biden's recent Executive Order encouraging renewed focus on the effects of anticompetitive concentrations of power on working people.

²⁶ Nguyen, Terry, Air travel will suck this summer. Blame the airlines' shortsighted layoffs. (Jun. 28, 2021) <https://www.vox.com/the-goods/22550623/air-travel-summer-post-covid-layoffs>.

²⁷ See Supplement to Complaint Based on Market Implementation of American's Strategic Partnerships (May 12, 2021) Docket DOT-OST-2021-0001 at pp. 8-9, 13-14.

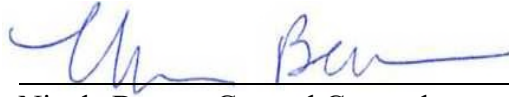
²⁸ See Agreement with U.S. Department of Transportation regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways Corporation, (Jan. 10, 2021) available at <https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%2011021%20website.pdf>.

III. Conclusion

Given the concerns discussed here, SEIU respectfully requests that the Department commence a full and transparent review, which includes the opportunity for public comment, of the American Airlines and JetBlue Airways Northeast Alliance joint venture agreement.

Dated: September 10, 2021

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Nicole Berner", is written over a horizontal line.

Nicole Berner, General Counsel
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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, I served a copy of the foregoing document upon the following persons via email.

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